Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TODD PACIFIC SHIPYARDS CORP., and
AETNA CASUALTY AND SURETY CO., INC.

Petitioner,

vs.

RICHARD L. EDWARDS,
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Was it error for the Ninth Circuit to adopt the Director's view that jobs must be realistically and regularly available over a claimant's lifetime in order for an employer to avoid a permanent and total award?

II. Was it error for the Ninth Circuit to effectively render an employer a guarantor of a claimant's job over his lifetime?

III. What is the proper test for identifying suitable alternative employment under the Longshore and Harbor Workers' Compensation Act?

LIST OF PARTIES

The following are the parties to this proceeding:

Richard L. Edwards
Plaintiff-Respondent

Todd Pacific Shipyards Corporation,*
Aetna Casualty and Surety Company, Inc.**
Defendant-Petitioner

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San Pedro, California 90731
Attorneys for
Defendant-Petitioner

Director, Office of Workers' Compensation Programs, United States Department of Labor,
Party-in-Interest

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* In compliance with Rule 29.1 of the Supreme Court of the United States, Todd Pacific Shipyards Corp. is a wholly owned corporation and there is no parent company or subsidiaries.

** See page iii. In compliance with Rule 29.1 of the Supreme Court of the United States.

THE AETNA CASUALTY AND SURETY COMPANY, INC.*

1. The Parent Corporation of The Aetna Casualty and Surety Company, Inc. is Aetna Life and Casualty Company.

2. The affiliate companies of The Aetna Casualty and Surety Company, Inc. (which are also first tier subsidiaries of Aetna Life and Casualty Company, wholly and non-wholly owned) are:

Aetna Life Insurance Company
The Standard Fire Insurance Company
Aetna Life Insurance and Annuity Company
Aetna Canada Holdings Ltd.
Aetna (U.K.) Holdings Company
Aetna International, Inc.
Aetna International (Australia) Pty. Limited
Aetna International (N.Z.) Limited
Aetna Life Insurance Company of Illinois
ACS Financial Services, Inc.
ACS Portfolio Services, Inc.
Luettgens Limited
AE Housing Corp.
Structured Benefits, Inc.
AE Four, Incorporated
AE Five, Incorporated
Aetna Life & Casualty International Finance N.V.
Span Data Processing Center, Inc.
5th Generation, Inc.

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* In Compliance with Rule 29.1 of the Supreme Court of the United States.

Aetna Foundation, Inc.
AE Ten, Incorporated
AE Fifteen, Incorporated
Aetna Investment Management
(Bermuda) Holdings Limited
Arcelia Limited
Aetna Realty Investments 1, Inc.

3. Subsidiaries of the Aetna Casualty and Surety Company, Inc., (wholly owned and non-wholly owned) are as follows:

Aetna Casualty & Surety Company of Illinois
Aetna Casualty & Surety Company of America
Aetna Casualty Company of Connecticut
Aetna Commercial Insurance Company
Aetna Excess and Surplus Lines Company
Farmington Casualty Company
Aetna Lloyds of Texas Insurance Company
Urban Diversified Properties, Inc.
Farmington Holdings, Inc.
Aetna Realty Investors, Inc.
Aetna Financial Services, Inc.
Ponderosa Homes
Axia Services, Inc.
AFF, Inc.
AE Development Group, Inc.
Aetna Opportunity Corporation
Chelsea Insurance Company Ltd.
AE Investments, Inc.
Aetna Casualty & Surety Company of Canada
Aetna National Account U.K. Limited
AECC, Inc.
Executive Risk Management Associates
Executive RE, Inc.

Aegen International, Inc.
Parklake Associates
Northlake Centre Associates
Central Trust Centre Associates
211 East Ontario Associates
TAAS Associates
South Bend Joint Venture
Aetna/Aerea Corporation

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RICHARD L. EDWARDS,
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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
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NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Todd Pacific Shipyards Corp. and Aetna Casualty and Surety Co., Inc. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 14, 1993. Denial of petition for rehearing and rejection of suggestion for a rehearing en banc was filed September 10, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 999 F.2d 1374, and is reprinted in the appendix hereto, p. A-1, infra.

The opinion of the Benefits Review Board is reported at 25 BRBS 49 (1991)

and is reprinted in the appendix hereto, p. A-12, infra.

The opinion of the Administrative Law Judge is unreported but docketed under 84 LHC 2565 and is reprinted in the appendix hereto p. A-28, infra.

JURISDICTION

Edwards, petitioner below, invoking Federal jurisdiction under 33 U.S.C. §921(c) appealed a decision of the Department of Labor's Benefits Review Board under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et. seq. to the United States Court of Appeals for the Ninth Circuit. It has been held that the Court of Appeals will review decisions of the Board "for errors of Law and for adherence to the

statutory standard governing the Board's review of the Administrative Law Judge's factual determinations."[1]

This petition seeks review of the Opinion and Order of the United States Court of Appeals for the Ninth Circuit filed July 14, 1993 reversing and remanding the Board's decision. Jurisdiction is appropriate under 28 U.S.C. §1254(1). This Petition for Writ of Certiorari was timely filed pursuant to 28 U.S.C. §2101(c) subsequent to denial September 10, 1993 by the Ninth Circuit of petition for rehearing and rejection of suggestion for rehearing en banc.

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[1] Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1329 (9th Cir. 1980)

STATUES INVOLVED

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §902(10):

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment...

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §908(a):

> Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability...In all other cases permanent total disability shall be determined by the facts.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §908 (a):

> Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter in the same employment or otherwise, payable

during the continuance of partial disability.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §908(h):

> The wage earning capacity of an injured employee in cases of partial disability under subsection (c)21 of this section or under subsection (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage earning capacity: Provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Deputy Commissioner may, in the interest of justice, fix such wage earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

STATEMENT OF THE CASE

Richard Edwards, (hereinafter "Edwards" or "claimant") a burner/welder for Todd Pacific Shipyards[2] (hereinafter, "employer" or "petitioner") injured his low back. Afterwards he returned to Todd and worked intermittently until 1984, when he could no longer perform his usual job.

Edwards was then provided vocational rehabilitation services. Steven Low, a rehabilitation specialist, arranged for vocational assessment, training and provided job development and job seeking services.

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[2] Aetna Casualty and Surety Company, Inc. provided insurance coverage for Todd's liability under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950, (hereinafter "Longshore Act" or "LHWCA".

Lowe completed several labor market surveys for mechanical inspector showing the availability of mechanical inspector jobs both before and after Edwards had completed a fifteen week training course.

Edwards was hired as a floor inspector August 20, 1985 by Nardon Manufacturing. The parties agreed that this work was in all respects appropriate for him (Hearing Transcript, hereinafter "HT", pp. 14-15).

Edwards performed his job at Nardon satisfactorily and even worked a little overtime. He was laid off November 5, 1985 not for reasons related to his disability but, due to a reduction in force (HT pp. 26-27).

Edwards was unemployed until he was hired September 26, 1986 through a temporary agency by Excellon, as a parts inspector. The job ended November 5, 1986 (HT pp. 29-30).

On December 9, 1986 an administrative trial was held to resolve, among other issues, the nature and extent of Edwards' disability between November 5, 1985 and September 24, 1986, and from November 6, 1986 and continuing (Administrative Law Judge Decision and Order, hereinafter "ALJ D&O", p. A32-33).

The trial judge concluded that Edwards' short-lived employment had not satisfied Todd's burden of demonstrating suitable alternative employment. He also found that the testimony and labor market surveys of the rehabilitation specialist were insufficient to show

suitable alternative employment because the jobs were filled at the time Edwards applied for them, or Edwards lacked the requisite experience, or Edwards simply wasn't hired.

Furthermore, the Judge held, even if there were suitable jobs available to Edwards his diligent, but unsuccessful efforts to obtain work, rebutted the employers' showing of suitable alternative employment.

Edwards was awarded permanent partial disability during his periods of employment at Nardon and at Excellon, and permanent and total disability from November 6, 1986 and continuing (ALJ D&O p. A56-57; also see §908(a) and (c)(21)).

BENEFITS REVIEW BOARD HOLDING

Todd appealed the ALJ's decision to the Benefits Review Board (hereinafter

"Board" or "BRB") contending that Edwards' employment at Nardon established suitable alternative employment per se.

Edwards responded urging affirmance of the ALJ's decision.

The Board's decision first noted that an employee establishes a prima facie case of total disablity if he shows he cannot return to his usual work. The employer then has the burden of showing that specific work is available to the employee which takes into consideration his age, skills, abilities and physical limitations.[3]

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[3] Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980; also citing Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540 (4th Cir. 1988); Rogers Terminals & Shipbuilding Corp. v. Director, OWCP, 784 F.2d 687, 690 (5th Cir. 1986) cert. denied, 479 U.S. 826 (1986).

The Board explained that "the employer is not an employment agency for the disabled claimant and has no obligation to find the claimant any particular job" (BRB Decision and Order, hereinafter "BRB D&O", p. A-20). the Board concluded that Edwards' Nardon employment was sufficient to satisfy the employer's burden and rebut claimant's claim for permanent and total disability.

The Board pointed out that Edwards had been retrained, had accepted the position and in all respects had been satisfactorily employed in a specific job (BRB D&) p. A-21).

The "employer is not a long term guarantor of a claimant's employment" (BRB D&O p. A-22) the Board stated.

Therefore, the loss of the Nardon employment, for reasons unrelated to Edwards' injury, did not impose upon the employer the responsibility of identifying additional suitable work.

Since the Nardon employment and sufficient to satisfy the employer's burden, the Board did not need to address Edwards' diligent but unsuccessful efforts to obtain a job.

The Board reversed the D&O of the ALJ on the issue of permanent and total disability and awarded Edwards permanent partial weekly disability benefits of $147.63.

THE NINTH CIRCUIT DECISION

Edwards appealed to the United States Circuit Court Of Appeals for the Ninth Circuit contending that the BRB had

substituted its factual determination for that of the ALJ's.

The Director of the Office of Workers' Compensation Programs (hereinafter "Director") filed a response brief contending that the BRB had used an improper legal standard in assessing the existence of suitable alternative employment and urged the Court to defer to its interpretation of relevant statute.

First, the Ninth Circuit acknowledged that the Board's rulings of law are reviewed de novo.[4] However, "considerable weight" is given to the interpretation of the LHWCA urged by the Director.[5]

[4] Stevens v. Director, OWCP, 909 F.2d 1256, 1257 (9th Cir. 1990), cert. denied sub nom; Lockheed Shipbuilding Co., v. Director, OWCP, 111 S. Ct. 798 (1991).

[5] Force v. Director, OWCP, 938 F.2d 981, 983 (9th Cir. 1991).

At the Directors' urging, the Ninth Circuit concluded that Edwards' employment at Nardon was not "reaslistically and regularly available" (Ninth Circuit Opinion and Order, hereinafter "Ninth D&O" p. A-11 infra. Because wage earning capacity is the "touchstone" of disability under Section 8(h) of the Act, the Director argued, and the court accepted, that earnings from suitable alternative employment must be "sufficiently regular". Such a view, the Director argued, serves the remedial purposes of the Act to compensate injured workers for injury related diminution of wages throughout the claimant's lifetime.[6]

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[6] Randall v. Comfort Control, Inc., 725 F.2d 791, 799 (D.C. Cir. 1984) emphasis added by the Court).

In adopting the Director's interpretation, the Court concluded that Edwards' Nardon employment did not constitute suitable alternative employment because it was not "realistically" available nor sufficiently "regular".

Further, examining the record below, the court held that there was substantial evidence to conclude that Todd had not otherwise met its burden to show suitable alternative employment. Even if they had, claimant's diligent, but unsuccessful efforts to obtain employment rebutted any such showing.[7]

The Ninth Circuit reversed the Board's decision and remanded the matter for reinstatement of the ALJ's D&O. See p. A-11, infra.

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[7] Palumbo v. Director, OWCP, 937 F.2d 70 (2nd Cir. 1991).

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S ADOPTION OF THE DIRECTOR'S VIEW THAT JOBS MUST BE REALISTICALLY AND REGULARLY AVAILABLE OVER A CLAIMANT'S LIFETIME IN ORDER FOR AN EMPLOYER TO MEET ITS BURDEN TO SHOW SUITABLE ALTERNATIVE EMPLOYMENT CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit held previously under Bumble Bee, infra, that for an employer to effectively rebut a prima facie showing of total disability it must:

> 1. Identify suitable alternative employment within the claimant's physical restrictions, knowledge, experience and geographical area,

and,

> 2. Establish actual job openings.

Edwards, requires more. The employer must show that actual job openings are

"realistically and regularly available"[8] and that the availability of such jobs exists over a claimant's lifetime (Randall, supra).

Furthermore, "realistically available" as interpreted by the Ninth Circuit means actual employment.

It cannot be ignored that the employer in this case clearly complied with the Bumble Bee standard in establishing suitable alternative employment. Specific jobs within Edwards' capabilities were identified. More significantly the employer found him a job.

Edwards, at the urging of the Director, requires an employer to meet its

[8] Lentz v. Cottman Co., 852 2d 129 (4th Cir. 1988).

Bumble Bee standard not just once but repetitively over a claimant's lifetime.

Furthermore, not withstanding the identification of specific jobs, failure to obtain or hold a job, for whatever reason, will impose upon the employer a permanent and total award. [9]

Edwards is in direct conflict with the holdings of other Circuits on this issue.

The First Circuit requires merely that an employer point to the age, education and work experience of a

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[9] In Edwards the Ninth Circuit adopted the Second Circuit's holding in Palumbo that permits a claimant to rebut an employer's showing of suitable alternative employment by showing he was diligent, but unsuccessful in obtaining the identified jobs.

claimant as indicative of his ability to perform other work. [10]

The First Circuit emphasizes the claimant's retained capabilities to establish alternative work. The employer's burden, the Court suggested, should be tailored accordingly.

Suitable alternative jobs in the Fifth Circuit must,

> 1) consider(ing) claimant's age, background etc. what can claimant physically and mentally do following his injury...what types of jobs is he capable of performing or capable of being trained to do ?
>
> 2) (Of these jobs) are (they) reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? [11]

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[10] AirAmerica, Inc., v. Director, OWCP, 597 F.2d 773 (1st Cirt. 1979).

[11] New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (Fifth Cir. 1981).

In Turner, the Fifth Circuit rejected the "stringent standard" of Bumble Bee requiring a showing of specific jobs, concluding that such a requirement "would make the employer, in effect, an employment agency...to satisfy the millstone of proof" (supra, p. 1042).

Reiterating its decision in Turner, the Fifth Circuit in Avondale Shipyards v. Guidry and Director, OWCP, (967 F.2d 1039 (Fifth Cir. 1992), rejected the notion that its Turner standard mandated a showing of actual job openings. Moreover, Justice Jolly, concurring and dissenting on other grounds, highlighted the proper focus for the inquiry.

The illuminated question, he stated, (Turner, supra, p. 1046) should address whether

> the unavailability of a higher paying job to Guidry (is) causally related to his injury, not to the market, personal choice, or other factors.

In rejecting the necessity to show either specific or actual job openings, the relevant inquiry becomes the causal connection between injury effects, and post injury wage earning capacity. All other factors are filtered out. (See Guidry, supra p. 1046).

This view is shared by the Fourth Circuit. In Brooks[12] , the unavailability of suitable alternative employment was found unrelated to claimant's injury. Rejecting the "but for" argument of both the Director and the claimant, the Court affirmed the BRB which said:

> Since the claimant was discharged for reasons unrelated to his

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[12] Brooks v. Director, OWCP, 2 F.3d 64 (Fourth Cir. 1993).

> disabilty, the employer was not obligated to identify (further) suitable alternative employment."

The Fourth Circuit emphasis, as in Guidry, is on the causal nexus between injury and post injury earning capacity. Furthermore, once the employer had shown the availability of suitable alternative employment by providing such work, its burden has been met. The employer, the Fourth Circuit stated, was not further obligated.

A plain reading of Section 902(10) provides the basis for an injury-loss of wage earning capacity nexus. It defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment..."

Noting that the Act must account for the particularities of a claimant, the D. C. Circuit highlighted and explained "because of injury" under the Act "clearly requires a causal connection between the worker's physical injury and his inability to find suitable employment" (Brooks, supra, p. 53).

The holding of the Ninth Circuit may root its "realistically and regular" standard in the causal nexus clause of §902(10) but ignores it in application.

Edwards did not lose his employment at Nardon because he was physically unable to do the work. He lost his job because Nardon simply ran out of work for him to do, quite a common occurrence in today's economy.

The Ninth Circuit's decision makes an employer responsible for Edwards' lost job, even when the loss had nothing to do with his injury. The holding conflicts with decisions on similiar facts in the First, Fourth, Fifth and D.C. Circuits. Accordingly, review by this Court is essential.

II.

THE NINTH CIRCUIT HAS EFFECTIVELY RENDERED AN EMPLOYER AN EMPLOYMENT AGENCY FOR AN INJURED WORKER

The Ninth Circuit in Edwards has effectively rendered an employer an employment agency for an injured worker in two ways.

First, the decision discards actual employment as a measure of earning capacity.

Second, it imposes upon the employer a continuing duty to establish the existence of suitable jobs for a claimant over his lifetime.

The rejection of Edwards' Nardon employment as suitable, ignores that Edwards punched a time card for almost three months, provided a valuable service to his employer, and received wages for satisfactory work performance.

Yet the Court rejected that this very real job was "realistically available".

Focusing on the duration of the Nardon employment, the Court also found it was not "sufficiently regular". If Edwards' job had lasted six months would that have been "sufficiently regular"? What about a year? Two years? What

period of time would the Court have found "sufficient"?

Yet, the decision does give some guidance as to how it answers this question. The Court in footnote quotes Randall (supra),

> The remedial purposes of the Act, are to "compensate for any injury related reduction in wage earning capacity through claimant's lifetime."

The added emphasis by the Court suggests the limits it places on an employers' obligation i.e. a claimant's lifetime.

Yet, Section 908(c)(21) of the LHWCA requires payment of benefits for loss of wage earning only so long as partial disability continues. Such language presupposes that disability may end at some point, short of a claimant's death.

The question necessarily follows, at what point is suitable alternative employment established?

Even under the "stringent" Bumble Bee standard, the burden to employer ceased when the employer pointed to specific, appropriate jobs.

Yet, in Edwards, a specific job was insufficient because it wasn't sufficiently "realistic or regular".

Actual job openings identified by the employer or developed by the claimant himself failed to lessen the employers' burden. Edwards' failure to get a job, notwithstanding his diligence, was enough to overcome the uncontroverted fact that appropriate jobs existed. (See ALJ D&O, p. C-28).

The rehabilitation specialist could not explain Edwards' failure to secure work. Neither could Edwards himself (HT pp. 76-80).

Nothing in the record establishes a causal link between Edwards' failure to secure admittedly appropriate work and his injury.

Yet, under Edwards anything short of a continuing job burdens the employer with a permanent and total award.

The employer becomes an employment agency for an injured worker and a guarantor of his job for life. Even if the failure of a claimant to secure work has absolutely nothing to do with his physical impairment, "no job" equates to total disability.

Society's interest in returning and encouraging injured workers to return to productive employment is high. Promoting self-reliance and personal initiative by interpreting a statutory scheme in such a manner that promotes employment is compatible with the benevolent purposes of the Act.

Requiring the diminution in post injury wages whether complete or partial, to be causally linked to physical impairment, is compatible with the statutory scheme of the LHWCA and in keeping with the decisions of the First, Fourth, Fifth and D.C. Circuits on this issue.

The Fifth Circuit in Turner (supra at p. 1042) warned,

> A finding of permanent and total would result by simply proving that one cannot return to his former job,

> thereby encouraging an injured employee rather than seeking rehabilitation, to rely upon the presumption that operates in his favor and avoid any active effort to secure employment.

To ignore the necessity of a causal nexus between physical impairment and a showing to establish loss of wage earning capacity, the Turner court cautions, would be to run

> ...counter to all the innumerable projects, governmental (state and federal) and private, which look toward restoring the handicapped or injured the opportunity to become useful meaningful citizens and human beings (supra at p. 1042).

Edwards signficantly impacts longshore employers financially. Their obligation is continuous, repetitive and carries enormous administrative and adjudicative costs.

Society also pays a high price when an injured workers' return to employment

is not encouraged. Such a price cannot be discounted.

CONCLUSION

For the reasons set forth above, the Ninth Circuit's decision is inconsistent with a plain reading of the LHWCA, is in conflict with the holdings of other circuits on this issue, and ultimately runs counter to the societal objective of returning injured workers to gainful employment.

Petitioner therefore requests that this Court grant this Petition for Certiorari.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. EDWARDS,	)	
Claimant-Petitioner,	)	No. 91-70648
	)	OWCP No. 18-00163
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, TODD SHIPYARDS CORPORATION; AETNA CASUALTY AND SURETY COMPANY, INC.,	)	BRB Nos. 87-1573, 87-1573A
	)	OPINION
Respondents.	)	

Petition for Review of an Order of the Benefits Review Board

Argued and Submitted
April 8, 1993 - Pasadena, California

Filed July 14, 1993

Before: Jerome Farris, William S. Norris, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Labor and Employment/Workers Compensation/Administrative Law/Judicial Review

The court of appeals reversed an order of the Benefits Review Board and remanded. The court held that an employer did not meet its burden of proving the availability of suitable alternate work for an injured worker who had been retrained.

Petitioner, Richard Edwards, was injured while working for respondent, Todd Shipyards Corporation. Too disabled to return to his usual occupation, Edwards was retrained as a mechanical inspector and found work in that capacity for eleven weeks, after which he was laid off due to a reduction in force. Edwards was unable to find other work. His claim for total

disability benefits was granted by an ALJ. The Board reversed, holding that Todd's burden of proving the availability of suitable alternate work was met by Edwards's eleven weeks of work as an inspector. Edwards petitioned for review.

[1] On appellate review, considerable weight was accorded to the interpretation of the Longshore and Harbor Workers' Compensation Act urged by respondent Director. [2] The Director asserted that Edwards's eleven weeks of work did not prove that suitable alternate work was realistically and regularly available to Edwards on the open market. The Director based his assertion on the interpretation that under the Act, wage-earning capacity was the touchstone of the extent of disability, and that post injury

earnings must be sufficiently regular to establish true earning capacity. The director's interpretation fairly served the long-term remedial purpose of the LHWCA and was therefore deferred to.

COUNSEL

Diane L. Middleton and Marc Coleman, Middleton & Coleman, San Pedro, California, for the petitioner.

Joshua T. Gilleran, U. S. Department of Labor, Washington, D. C., for respondent Director, Office of Workers' Compensation Programs.

Daniel F. Valenzuela and Yvette Boehnke, Samuelsen, Gonzalez, Valenzuela & Sorkow, San Pedro, California, for respondents Todd Shipyards Corporation and Aetna Casualty and Surety Company, Inc.

David N. Neusner, Embry & Neismer, Groton, Connecticut, for the amicus.

OPINION

NORRIS, Circuit Judge:

Richard Edwards suffered a job-related injury that prevented him from continuing his work as a welder-burner for Todd Shipyards. After Todd retrained him as a mechanical inspector, he found work in that capacity at Nordon Manufacturing, but was laid off after 11 weeks because of a reduction in the work force. He was then unable to find other work.

Edwards filed a claim for total disability benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., §901, et seq. ("LHWCA"). The Administrative Law Judge ("ALJ") awarded Edwards total disability benefits, finding that Todd had not proved that there was suitable alternate work available to Edwards. The Benefits

Review Board ("the Board") reversed the ALJ's award on the ground that Edwards' 11-week job as a mechanical inspector for Nordon satisfied Todd's burden of proving the availability of suitable alternate work. The Board reasoned that "an employer is not a long-term guarantor of a claimant's employment." Board Opinion at 3. Edwards petitions for review of that decision. Exercising our jurisdiction under 33 U.S.C. §921(c), we reverse the Board's decision and remand for reinstatement of the ALJ's award.

I

Under the LHWCA, once Edwards proved that his work-related injury prevented him from performing his former job, the burden shifted to his employer, Todd Shipyards, "to prove that suitable alternate work was available in the

community." Hairston, v. Todd Shipyards Corp., 849 F.2d 1194, 1996 (9th Cir. 1988). If Todd fails to meet this burden, it must pay Edwards permanent and total disability benefits. Id.

Edwards' petition for review presents the following question of law: Whether Edwards's short-lived job as a mechanical inspector satisfied Todd's burden of proving the existence of suitable alternate work.

[1] Although we review the Board's rulings on issues of law de novo, Stevens v. Director, OWCP, 909 F. 2d 1256, 1257 (9th Cir. 199), cert. denied sub nom. Lockheed Shipbuilding Co. v. Director, OWCP, 111 S. Ct. 798 (1991), we accord "considerable weight" to the interpretation of the LHWCA urged by the Director of the Office of Workers' Compensation Programs. Force v.

Director, OWCP, 938 F. 2d 981, 983 (9th Cir. 1991).

[2] The Director argues that the Board erred in holding that the fact that Edwards held a job as a mechanical inspector at Nordon for 11 weeks carried Todd's burden of proving the availability of suitable alternate work. In the Director's view, Todd failed to carry this burden because the short-lived employment at Nordon did not prove that suitable alternate work was "realistically and regularly available" to Edwards on the open market. Director's Br. at 16 (emphasis in original). The Director rests this view on the belief that "wage earning capacity," 33 U.S.C. §908(h), is the touchstone of the extent of disability determination under the Act, Director's Br. at 22, and that earnings in post-

injury employment must be sufficiently regular to establish true earning capacity. Director's Br. at 39 (citing 2 Arthur Larson, The Law of Workmen's Compensation §57.35 (1989)). We defer to the Director's interpretation of the employer's burden of proving that suitable alternate work was available in the community. It fairly serves the long-term remedial purpose of the LHWCA, an act designed to "compensate for any injury-related reduction in wage-earning capacity through the claimant's lifetime." Randall v. Comfort Control, Inc., 725 F.2d 791, 799 (D.C. Cir. 1984, (emphasis added.)[1]

[1]The Fourth Circuit has also adopted the Director's position. See Lentz v. Cottman Co., 852 F.2d 129, 131 (4th Cir. 1988) ("By proving that the injured employee retains the capacity to earn wages in regular, continuous employment, the employer's compensation liability is reduced or eliminated." (emphasis added)).

II

Having decided that the Board erred in ruling that Edwards' short-lived job at Nordon proved the availability of suitable alternate work, we now decide whether there was sufficient evidence to uphold the ALJ's decision awarding Edwards total disability benefits. The ALJ's determination that Todd did not prove the availability of suitable alternate work must be upheld if it was supported by substantial evidence. Hairston, 849 F.2d at 1195. Todd presented two market surveys showing the existence of a few openings as a mechanical inspector. Almost half of the listed openings were not available to Edwards because they required experience which he did not have. Edwards had contacted the other employers in the listings without any

success. Edwards had also searched diligently for a job at firms not listed in Todd's surveys, but again without success.[2] Thus, there was substantial evidence supporting the ALJ's determination that Todd had failed to prove the availability of suitable alternate work.

We accordingly REVERSE the Board's decision and REMAND for reinstatement of the ALJ's award.

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[2] A claimant's diligent yet unsuccessful job search may be used to rebut an employer's evidence of the availability of suitable alternate work. Palombo v. Director, OWCP, 937 F.2d 70, 73 (2d Cir. 1991); Newport News Shipbuilding & Dry Dock Co., v. Tann, 841 F.2d 540, 542 (4th Cir. 1988); Roger's Terminal & Shipbuilding Corp. v. Director, OWCP, 784 F.2d 687, 891 (5th Cir.) cert. denied, 479 U.S. 826 (1986).

U.S. DEPARTMENT OF LABOR
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB Nos. 87-1573
and 87-1573A

RICHARD L. EDWARDS Claimant-Respondent Cross-Petitioner v. TODD SHIPYARDS CORPORATION and AETNA CASUALTY & SURETY COMPANY, INC. Employer/Carrier-Petitioners Cross-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	DATE ISSUED: AUG. 29, 1991 DECISION and ORDER

Appeals of the Decision and order of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Diane L. Middleton (Middleton & Coleman), San Pedro, California, for claimant.

Daniel F. Valenzuela, Michael Marshak, and M. Joseph Rodriguez (Samuelsen, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (84/LHC-2565 of Administrative Law Judge Thomas Schneider awarding claimant benefits, finding employer eligible for relief from continuing compensation liability under 33 U.S.C. §908(f), and awarding an attorney's fee on a claim filed pursuant

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*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921 (b)(5) (Supp. V 1987).

to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921 (b)(3); O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant sustained a low-back injury on May 5, 1981, during the course of his work for employer as a burner/welder, but he continued to work sporadically for employer until 1984. Subsequent to his injury claimant received training as a mechanical inspector, which the parties agree is within his post-injury physical restrictions. Claimant has been employed for two periods of time

since 1984. He was employed as a floor inspector by Nordon Manufacturing from August 20, 1985 through November 6, 1985, when he was laid off for lack of work, and as a receiving inspector for Excellon from September 8, 1986 through November 5, 1986, when this temporary job ended. Claimant sought permanent partial disability benefits for the two periods of time he was employed and permanent total disability benefits for the period November 7, 1985, until September 24, 1986, and continuing from November 6, 1986.

In his Decision and Order, the administrative law judge found that claimant's salary during his two periods of employment was $6.25 per hour, and he awarded permanent partial disability benefits for these periods at the weekly rate of $147.63, based upon the

difference between claimant's pre-injury average weekly wage and his post-injury wages. 33 U.S.C. §908(c)(21). The administrative law judge further found that claimant is entitled to permanent total disability benefits for the periods of unemployment, and from November 6, 1986 and continuing. 33 U.S.C. §908(a). In addition to granting relief under Section 8(f) of the Act, 33 U.S.C. §908(f), the administrative law judge awarded claimant's attorney a fee, payable by employer, of $4,531.25 for 36.25 hours of services at $125.00 per hour, plus costs of $400.51.

Employer appeals, arguing that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. Claimant responds that as

the record supports the administrative law judge's conclusion that he was diligent in seeking alternate employment but was still unable to obtain a position, the administrative law judge's award of total disability benefits should be affirmed. Claimant cross-appeals, challenging the administrative law judge's award of an attorney's fee, and arguing that the reductions he made in the number of hours and the hourly rate requested are unreasonable. Employer responds that the administrative law judge's fee award should be affirmed.

The first issue presented by these appeals is whether the administrative law judge properly awarded benefits for permanent total, rather than permanent partial, disability for the periods of unemployment and from November 6, 1986

and continuing. Once a claimant establishes that he is unable to do his usual work, he has established a prima facie case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment which the claimant is capable of performing. See Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must show the availability of specific work within the geographical area where the claimant resides, which he could perform based upon his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Id. See also, Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 690 18 BRBS 79, 83 (CRT) (5th Cir. 1986), cert. denied, 479

U.S. 826 (1986); Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15, 18 (1986). Claimant's burden to demonstrate that he diligently has sought suitable alternate jobs arises after employer shows such jobs exist. Roger's Terminal, supra, 784 F.2d 687, 18 BRBS 79 (CRT). If the claimant demonstrates that he diligently tried, without success, to obtain the alternate employment, he will be entitled to an award of total disability benefits. See Palombo v. Director, OWCP, F.2d, No. 90-4047 (2d Cir., June 26, 1991); Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988).

In the instant case, it is uncontested that claimant cannot return to his usual employment as a burner/welder and that the position of mechanical inspector for which claimant has been trained is physically

appropriate. Employer contends on appeal that it established the availability of suitable alternate employment based upon the two inspector positions which claimant held and the testimony and market survey of a rehabilitation specialist. In addressing this contention, we initially note that while existing law requires that an employer demonstrate suitable alternate employment in order to relieve itself of responsibility for a claimant's permanent total disability, the employer is not an employment agency for the disabled claimant and has no obligation to find the claimant any particular job. Rather, the employer must simply identify specific suitable alternate employment that the claimant is capable of performing in his community considering his age,

education, vocational history, and physical limitations. See Bumble Bee Seafoods, supra; see also Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS (CRT) (4th Cir. 1988); Roger's Terminal, supra; New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Here employer did identify specific suitable alternate employment, i.e., a job as an inspector for Nordon Manufacturing, for which claimant had been retrained, which claimant accepted, and in which claimant was satisfactorily employed from August 20 to November 7, 1985. Further, the record reflects that claimant was laid off from this position not for reasons related to any disability resulting from his work injury, but due to a reduction in that employer's workforce. See Transcript of

Hearing at 27, 44; Employer's Exhibit 11; Claimant's Response Brief at 13. The fact that claimant was laid off due to this workforce reduction did not impose upon the employer the responsibility of identifying new suitable alternate employment, as an employer is not a long-term guarantor of a claimant's employment. In P & M Crane Co. v. Hayes, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991), the United States Court of Appeals for the Fifth Circuit found the identification by employer of one suitable alternate employment position sufficient to satisfy the employer's suitable alternate employment obligation. Cf. Lentz v. The Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). In this case, the claimant actually worked at an alternate job for several months post-injury, and stopped

working for reasons unrelated to his injury.[1] Accordingly, we hold that employer has established suitable alternate employment which satisfies all criteria, taking into account claimant's age, education, vocational history, and physical limitations. Moreover, in light of this finding, we need not address claimant's subsequent temporary position or claimant's diligence in seeking work elsewhere. We, therefore, reverse the administrative law judge's finding that claimant is entitled to permanent total,

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[1] See also Walker v. Sun Shipbuilding and Dry Dock Co., 12 BRBS 133 (1900), vac. and remanded mem. 642 F.2d 445 (3d Cir. 1981), decision after remand, 19 BRBS 171 (1986); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980) (employers established suitable alternative employment where claimants successfully performed light-duty work at employers' facilities, but were discharged for breaching company rules and not for reasons related to disability).

disability compensation for his periods of unemployment after August 20, 1985 and from November 6, 1986 and continuing and hold that claimant is entitled to permanent partial disability compensation at the rate already determined by the administrative law judge as awardable for the period claimant worked at the Nordon Manufacturing job.[2]

The remaining issue presented on appeal concerns the administrative law judge's award of an attorney's fee to

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[2] In his Decision and Order, the administrative law judge found that claimant's correct rate of permanent partial disability compensation is $147.63 per week:

$471.44 (claimant's average weekly wage at the time of injury)
-250.00 (40 x 6.25, the 1981 hourly wage of an inspector)
$221.44.44 x 66 2/3% - $147.63

This finding was not appealed, and it is hereby affirmed.

claimant's counsel.[3] Claimant's attorney requested a fee of $7,912.50 for 52.75 hours of services at $150.00 per hour. The administrative law judge awarded a fee of $4,531.25 for 36.25 hours at $125 per hour. An attorney's fee award is discretionary and will be set aside only if shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. See e.g., Roach v. New York Protectice Covering Co., 16 BRBS 114 (1984).

Claimant first argues that the administrative law judge erred in reducing the number of hours for which

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[3] We note that although a portion of the administrative law judge's award will be nullified as a result of the Board's decision, claimant's attorney still is entitled to a fee for work performed before the administrative law judge, as counsel was otherwise successful at that level of the proceedings. See generally 20 C.F.R. §702.132(a).

fees were claimed. The administrative law judge reduced the number of hours requested for making telephone calls from 26.5 hours to 10 hours because the 26.5 hours claimed for such calls constituted a little more than half of all the hours billed by counsel, as well as 106 of the 156 items listed in the fee petition, and he found that the request thus was unreasonably high. We hold that the administrative law judge in this case did not abuse his discretion in reducing the number of hours awardable for phone calls. In addition, we reject claimant's argument that the administrative law judge erred in reducing the requested hourly rate from $150 per hour to $125 per hour. The administrative law judge noted that $125 is the usual billing rate allowed by judges in the San Francisco Office of

Administrative Law Judges, and that he found nothing in this case which warranted a higher hourly rate. We hold that the $125 hourly rate set by the administrative law judge is reasonable, and it is therefore affirmed.

Accordingly, the administrative law judge's Decision and Order is reversed with regard to his award of compensation for total disability, and is otherwise affirmed.

SO ORDERED.

ROY P. SMITH
Administrative
Appeals Judge

REGINA C. McGRANERY
Administrative
Appeals Judge

FREDERICK D. NEUSNER
Administrative Law
Judge

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RICHARD L. EDWARDS, Claimant v. TODD SHIPYARDS CORPORATION Employer AETNA CASUALTY CASUALTY AND & SURETY COMPANY, INC., Carrier	)	CASE NO. 84-LHC-2565 OWCP NO. 18-16316

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For the Claimant

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For the Employer-Carrier

Before: THOMAS SCHNEIDER
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Richard L. Edwards, Jr. claims benefits under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §§901 et seq. At a hearing in San Pedro, California, on December 9, 1986, Todd Shipyards Corporation and Aetna Casualty & Surety Company (jointly "respondents"), and claimant were represented by counsel. The Special Fund did not appear.

Background

At the time of the hearing, claimant was 47 years old. (TR 19)[1/] Since 1961, claimant has been employed as a burner/welder both in Joliet, Illinois,

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[1/] As used herein TR refers to transcript by page number and RX refers to respondents' exhibits by exhibit number and page number.

and in California. (TR 20; RX 10-199) Prior to this, claimant performed primarily heavy, manual labor. (TR 21; RX 10-199) Claimant was employed by Todd Shipyards Corporation from December 12, 1979, through approximately 1984. (TR 20; TR 16)

Claimant sustained a low back injury on May 5, 1981, while employed by Todd Shipyards. (TR 5) Following his back injury, claimant worked sporadically at Todd Shipyards until 1984. (TR 16) Subsequently, claimant received training as a mechanical inspector, and began his search for work as a mechanical inspector. (TR 16) Claimant worked for Nordon Manufacturing from August 20, 1985, until November 5, 1985, as a floor inspector earning $7.00 per hour for 40 hours per week. (TR 27) He was laid off this job for economic reasons. (TR

26) Claimant's next job was with Excellon as a receiving inspector. (TR 29) He worked there from September 1986 until November 5, 1986, earning $8.09 per hour for 40 hours per week. (TR 30)

Injuries prior to the subject injury include those sustained in 1947 in an automobile accident, surgery of the left knee for torn cartilage and ligament in 1965, surgery on right wrist for carpal tunnel syndrome in July 1973, and unspecified injuries from an auto accident in November 1973. (RX 4-66 & 78; RX 5-182) In 1983 claimant told his doctors that he had recovered from these injuries. (RX 5-182)

Stipulations

The parties have stipulated to the following:

1. Claimant was employed by Todd Shipyards when he sustained an injury to

his low back on May 5, 1981. (TR 4)

2. There is jurisdiction under the Longshore and Harbor Workers' Compensation Act. (TR 4)

3. Claimant's average weekly wage was $471.44 and the resulting compensation rate is $314.29. (TR 4 & 151)

4. All appropriate benefits were paid for the time periods between the injury and August 20, 1985. (TR 5)

5. Medical benefits pursuant to Section 7 of the Act have been paid and there is no claim for unpaid medical expenses. (TR 5)

6. Claimant participated in a rehabilitation program and has been retrained as a mechanical inspector. (TR 5)

Issues

The issues presented are: (1) the

correct rate at which permanent partial disability should be paid for the periods of employment of 8-20-85 through 11-6-85 and 9-25-86 through 11-5-86; (2) the nature and extent of disability for 11-7-85 through 9-24-86 and 11-6-86 and continuing; (3) entitlement to special fund relief; and (4) attorney fees and costs.

Permanent Partial Disability Rate

Claimant returned to work on August 20, 1985, for about two and a half months. (TR 14) Claimant also worked from September 25, 1986, for one and a half months. (TR 14) Respondents paid some permanent partial disability benefits during this time, and agreed at the hearing that the law requires computations to be based on the stipulated average weekly wage minus the wage the new employment would have paid

at the date of the injury, in this case 1981. (TR 9 & 10) The disagreement lies in the calculations.

Respondents' rehabilitation specialist, Steven Lowe, testified at the hearing that mechanical inspectors earned from $5.00 to $7.00 an hour during mid-1981. (TR 64) Mr. Lowe estimated that the average wage of a mechanical inspector at that time would likely have been $6.25 an hour. (TR 64)

Since there is no other evidence as to the salary of a mechanical inspector during mid-1981, and since claimant was earning an average salary within the wage scale of 1986 ($5.00 to $10.00 an hour) (TR 62), I find that claimant's corresponding salary for his two periods of employment in 1981 dollars is $6.25. Thus, for the time periods of 8-20-85 through 11-6-85 and 9-25-86 through

11-5-86, the correct rate of permanent partial disability benefit payments is $147.63 per week [claimant's average weekly wage of $471.44 minus $250.00 ($6.25 per hour x 40 hours per week) times 66 2/3%].

Extent of Disability for Periods of Unemployment

The time periods at issue here are from 11-7-85 through 9-24-86 and 11-6-86 to date of hearing and continuing. Claimant testified he was laid off work as a floor inspector from Nordon on November 6, 1985. (TR 27) The lay off was apparently due to a reduction of the work force as a result of lack of work. (TR 58) Claimant was unemployed from 11-7-85 until 9-25-86 when he began work and worked for about a month and a half. (TR 14) However, that job was only temporary; thus claimant was unemployed

again as of 11-6-86. (TR 30)

The parties dispute whether respondents are responsible for compensation for total disability during these two time periods. In order for me to find that claimant is totally disabled, claimant must demonstrate he is unable to return to his former employment. The burden then shifts to respondents to prove that claimant is only partially disabled by demonstrating that realistic, suitable job alternatives exist. Dantes v. Western Foundation Corp., 10 BRBS 541 (BRB 1979); New Orleans (Gulfwide) Stevedores v. Turner, F.2d 1031 (5th Cir. 1981).

In the present case, the parties agree claimant cannot return to his former employment and the record supports this agreement. (TR 14 & 16; RX 10-199; RX 4-90 Further, claimant

agrees that the work of mechanical inspector for which he was retrained is suitable alternative employment. (TR 14 & 15) Claimant, however, argues that respondents have not shown that this work is available. 9TR 15) Thus, claimant-argues he is entitled to total disability payments for the time periods in question. (TR 15) Respondents argue that they have made a prima facie showing of suitable alternative employment; that claimant was laid off work for economic reasons, not reasons related to his disability; and that claimant cannot revert back to total disability for economic reasons. (TR 16)

Respondents' burden includes a showing of the existence of jobs which claimant could perform and for which he could compete and have a realistic

likelihood of securing if he diligently tried. Turner, supra, 661 F.2d at 1042-1043. Pursuant to Ramirez v. Vessel Jeanne Lou, Inc., 14 BRBS 689, 693 (BRB 1982), in order to meet this burden, an "employer must establish the actual availability of realistic as opposed to speculative potential jobs. Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473 (BRB 1978)." If the employer fails to establish that claimant can perform suitable alternative employment or that suitable alternative employment is available, claimant is entitled to total disability benefits. Parris v. Eller and Company, 16 BRBS 252 (BRB 1984)

Claimant concedes and the doctors' reports confirm that work as a mechanical inspector is work he could perform. (TR 14 & 15; RX 4-73, 83)

Respondents submitted two market surveys and testimony to establish the availability of work for mechanical inspectors in the geographical area of Los Angeles and Orange counties. (RX 10-231; RX 12; TR 54)

In the March 1985 survey, at most two of the listings showed current openings and a willingness to accept applicants without prior experience. (RX 10-234) Three of the listings stated openings but required at least one year of experience, which claimant did not have at that time. (RX 10-232 & 233) Claimant received his certificate as a mechanical inspector in June 1985. (RX 10-203) For two of the job listings, the required qualifications were uncertain, and for the rest there were no present openings (RX 10 232-234)

In the November 1986 survey, at least three of the ten listings required one or more years of prior experience. RX 12) At the time of the hearing claimant had had two months of experience. (TR 135) Claimant testified that he also did not have the experience required by a fourth employer. (TR 104) A fifth listing did not require a specific amount of prior experience, but did not have an opening. (RX 12) Thus, at least half of the listings were unavailable to claimant on their face. During the hearing claimant testified to attempting to contact the employers on this market survey with very little success. (TR 95 -104) In addition, claimant indicated that in his own job search he had been somewhat more successful since he had been able to fill out applications and leave resumes.

(TR 106)

I credit claimant's testimony and find that claimant has diligently attempted to find work as a mechanical inspector. Respondents tried to show that claimant spent most of his time at a pool hall through the testimony of a private investigator. (TR 83 & 84) However, I believe Claimant's explanations for his time spent at the hall and find that he diligently pursued his job search, as demonstrated by his effort to contact all of the employers on the market survey (TR 95 - 104) and by the reports of the job development specialist who initially assisted claimant in conducting his job search. (RX 10-104 - 214)

In spite of the positive review of claimant's interviewing skills by the job development specialist and

claimant's efforts to secure and retain a job as a mechanical inspector, he has had very little success. His first employment as a mechanical inspector ended due to insufficient available work. (TR 58) Although respondent's rehabilitation specialist testified to a foreseeable growth in the need for mechanical inspectors, this foreseeable growth appears purely speculative (TR 64) Respondents have shown some listings of job openings; but have not established that these job openings are available to claimant for are ones he could realistically compete for and have a chance of securing. Thus, I find that respondents have not met their burden of showing suitable alternative work that is available.

Respondents argue that claimant was laid off from his post-injury employment

for economic reasons, not for reasons of his disability, and therefore respondents are not liable for total disability benefits during the periods of claimant's unemployment. Respondents cite several cases to support their position that if post-injury employment is terminated without bearing on claimant's ability to-work, the employer has met its burden of proving suitable alternative employment. These cases are Walker v. Sun Shipbuilding and Dry Dock Company, ___ BRB ___, Slip Op. BRB 82-1609 (BRB 1986), Harrod v. Newport Shipbuilding and Dry Dock Company, 12 BRBS 10 (BRB 1980), and Hariston v. Todd Shipyard Corporation, 19 BRBS 6 (BRB 1986). In fhe first case, claimant was employed post-injury in a light duty position, but was terminated because he violated his union's collective

bargaining agreement. Walker, supra, ___BRBS, slip Op., at 2. In the second case, claimant was also employed post-injury in a light duty position, and was subsequently discharged because of a company policy infraction and not for disability-related reasons. Harrod, supra 12 BRBS at 11. Claimant in the third case was hired as a security guard and subsequently fired when his employer learned of his prior criminal record. Hairstone, supra, 19 BRBS at 8. In each of these cases the Board held that employer was not liable for total disability payments.

The present situation differs from the cases cited by respondents. In the above cases there appears to be a showing of initial availability of employment to claimant. This employment was subsequently terminated because of

claimant's past or present conduct. In this case, termination was not the result of conduct by claimant. Respondent's rehabilitation specialist could not explain why claimant was not able to obtain a job. (TR 76 - 80) The indications from the record are that for a variety of reasons employment as a mechanical inspector has not been available to claimant.

In Lunsford v. Marathon Oil Company, 15 BRBS 204, 208 (BRB 1982), the Board noted that presumably even if the employer meets his burden "to show that there are jobs reasonably available, within claimant's capabilities, and for which claimant is in a position to compete realistically if he diligently tries", a claimant can still establish total disability if he can show that he has diligently, but unsuccessfully,

tried to obtain employment. In the present case it is questionable whether respondents have shown that there are jobs reasonably available to claimant. Even if they have, claimant's diligent but unsuccessful job search leads me to conclude he is totally disabled. Thus, I find claimant permanently and totally disabled from 11-7-85 through (-24-86 and from 11-6-86 to date of hearing and continuing. Therefore, claimant is entitled to compensation at the rate of $314.29 per week during these periods.

Special Fund Relief

The underlying policy of the Special Fund is to encourage employers to hire handicapped or previously injured employees. In order to obtain relief from the Special Fund, the employer must meet two statutory requirements and one court-made requirement. In this case

the respondents have met all three requirements.

The two statutory requirements are (1) an existing permanent partial disability (2) that combines with the subject injury to produce a disability that is materially and substantially greater than that which would have resulted from the subject injury alone. The record contains testimony that claimant was injured in a serious automobile accident as a child. (RX 5-182) According to Dr. Curry, claimant fractured his left arm and hand in that accident and was unconscious for about two weeks. (RX 5-182) There is also evidence that claimant underwent surgery on his knee, surgery to address carpal tunnel syndrome, and was involved in another automobile accident in 1973. (RX 4-66 & 78; RX 5-182) The extent of

any injuries from this accident are not specified.

On January 14, 1983, claimant reported to Dr. Curry that he had recovered completely from these prior injuries. (RX 5-182) At trial claimant testified that none of them kept him from performing his work at Todd Shipyards. (TR 30 & 31) However, Dr. Craemer, claimant's treating physician, reviewed the records of claimant's 1973 automobile accident and onset of his carpal tunnel syndrome. (RX 4-66) In his report of March 20, 1986, Dr. Craemer stated that claimant's obesity and prior automobile accident of 1973 combined with claimant's industrial injury to produce a "substantially and materially greater permanent impairment and disability than otherwise would have been expected." (RX 4-67) Dr.

Craemer's report also states that x-rays from 1973 indicate spina bifida occulta at S1 level. (RX 4-67)

Pursuant to case law, the term "disability" is to be interpreted not only to include an economic disability and a scheduled loss, but also "a physical disability that would motivate a cautious employer to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." Rowe v. Western Pacific Dredging, 12 BRBS 427, 431 (BRB 1980), citing C & P Telephone Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977).

Claimant's prior injuries and his spina bifida, if manifest, would certainly motivate a cautious employer to discharge or refrain from hiring

claimant. Unlike the claimant in White v. Bath Iron Works Corp., ___ F.2d ___, 19 BRBS 70 (CRT) (1st Cir. 1987), who possessed a medically discoverable but previously undetected spinal defect, this claimant's previous injuries and spina bifida were documented in medical reports and on x-rays available in 1973 and earlier.

Based on the record and Dr. Craemer's analysis, I find that there was an existing permanent partial disability and that it combined with the subject injury to produce a disability that is materially and substantially greater than that which would have resulted from the subject injury alone.

Since the 1973 automobile accident and the claimant's knee surgery were documented in available medical records, they were manifest. It is likely that

claimant's surgery for carpal tunnel syndrome and possibly his automobile accident as a child were also known to employer. Thus, I find respondents have met the three requirements and are entitled to Special Fund Relief.

Attorney Fees

Claimant's counsel seeks $7,912.50 as her fees based on 52.75 hours of attorney time billed at $150.00 per hour. Claimant's counsel also seeks costs of $400.51 to be assessed against respondents for cost of court reporting fees and deposition of Norman Lee Covington, respondents' private investigator.

Respondent's object to the number and duration of the telephone calls billed by claimant's counsel. Respondents also allege that many of the calls were made by non-attorneys and

therefore counsel should bill those calls at lower rates. Finally, respondents object to the $150.00 per hour as more than the usual and customary fee.

Although I have often approved billing in minimum units of quarter hours, that practice strikes me as unfair here. Of the 156 items listed on the fee petition, 106 are telephone calls. More than half of the time claimed, 26.5 hours, was attributable to telephone calls. My theory in approving 15 minute minimum units has been that it takes a lawyer 15 minutes to get a file folder, open it, and think what the case is about. That was my experience in many years of private practice. This rationale, that it takes 15 minutes to do almost anything on a case, really cannot be applied here and still be fair

to respondents. It is obvious that the 15 minute charges are logged simply because 15 minutes is a bookkeeping unit and not because 15 minutes is almost what each item took. Such frequent phone calls, in my experience, do not require the handling of a file. Such calls are about current matters that the attorney has in her head. When they are calls received rather than calls placed, there is no question of being put on hold, or redialing, or getting busy signals, or waiting for answering machines to speak their piece, or encountering any of the innumerable other obstacles to telephoning that all callers have experienced. But even calls placed generally do not take 15 minutes.

The Benefits Review Board has approved a 15 minute minimum billing in

Jarrell v. Newport News Shipbuilding and Dry Dock Co., 14 BRBS 883 (BRB 1982) and Neeley v. Newport News Shipbuilding and Dry Dock Co., ___BRBS___, BRB No. 82-2195 and 2283 (11/18/86). The Board said it would be unduly onerous to require counsel to keep records in less than 15 minute intervals. Here counsel has kept records of the phone calls. The Board's reasoning would award payments for keeping such records, even though the Board has said that such record keeping is part of customary office overhead and the time required for preparation of fee petitions is not compensible by employers. Morris v. California Stevedore and Ballast Company, 10 BRBS 375, 383-384 (BRB 1979). As stated, I have usually approved such minimum billing. I just find that in this case the ratio of

phone calls to other work is so striking that I decline to allow it. I reduce the 26.5 hours claimed for telephone calls to 10 hours.

Counsel states that her usual billing rate is $150.00 per hour. The usual billing rate allowed by judges in this office is $125. I would allow more in a complex case, or if time were very economically used, or if other factors applied. However, I find nothing unusual in this case, except the amount of time claimed for telephone calls.

Accordingly, I award attorney fees for 36.25 hours at $125 per hour, for a total of $4,531.25.

There is no objection to the costs claimed.

Respondents pray that claimant's attorney fees be allowed as a lien on compensation because they argue that

they have paid the reasonable amounts to claimant throughout the litigation. With respect to the permanent partial disability, I agree with respondents. However, respondents contested claimant's entitlement to compensation for permanent total disability, thus making the services of an attorney necessary. Therefore, I deny respondents' request.

ORDER

1. Respondents shall pay claimant compensation for permanent partial disability at the rate of $147.63 per week for the periods of August 20, 1985 through November 6, 1985, and September 25, 1986 through November 5, 1986, with credits for amounts previously paid.

2. Respondents shall pay to claimant compensation for permanent and total disability at the rate of $314.29

per week, with adjustments as required by 33 USC §910(f), for the periods of November 7, 1985 through September 26, 1986, and November 6, 1986 to the date of hearing and continuing for a total of 104 weeks, with credits for any amounts previously paid. After expiration of the 104 weeks, such payments and adjustments shall be made by the Special Fund.

3. Interest shall be added to all payments ordered above at the rate provided in 28 USC § 1961 in effect on the date this decision and order is filed in the office of the Deputy Commissioner.

4. Respondents shall pay Diane Middleton, claimant's lawyer, $4,531.25 as her fee, and $400.51 as costs.

THOMAS SCHNEIDER
Administrative Law Judge

Dated: May 28, 1987
San Francisco, California

Supreme Court, U.S.
FILED
FEB 7 1994
OFFICE OF THE CLERK

(2)

NO. 93-1224

**IN THE
SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1993

**TODD PACIFIC SHIPYARDS CORP., and
AETNA CASUALTY AND SURETY CORP.,**

Petitioner,

vs.

**RICHARD L. EDWARDS,
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED FOR REVIEW

I. Was there substantial evidence to support the findings of the Administrative Law Judge that the Employer failed to establish the availability of suitable alternative employment?

II. May an Employer escape financial responsibility as a matter of law from paying permanent and total disability benefits by showing a single, temporary job which the claimant could perform?

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NO. 93-1224

IN THE
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OCTOBER TERM, 1993

TODD PACIFIC SHIPYARDS CORP., and AETNA CASUALTY AND SURETY CORP.,

Petitioner,

vs.

RICHARD L. EDWARDS, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Richard L. Edwards (hereinafter "Edwards" or "Claimant") submits his Brief In Opposition To The Petition For Writ of Certiorari submitted by Petitioners Todd Pacific Shipyards Corp., and Aetna Casualty And Surety Corp., ("Todd" or "Employer") seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on July 14, 1993.

STATEMENT OF THE CASE

Edwards worked as a burner/welder for Todd from December 12, 1979 through approximately 1984. Edwards sustained a low back injury on May 5, 1981 while employed by Todd. Following his back

injury Edwards worked intermittently at Todd until 1984. The parties agree that Edwards could no longer do his job as a burner/welder due to his injury.

Edwards attended the California Training Institute for fifteen weeks in a rehabilitation program and received a certificate as a mechanical inspector. The parties agree that the work of a mechanical inspector constituted suitable alternative employment.

From August 20, 1985 to November 5, 1985, Edwards worked as a floor inspector at Nordon Manufacturing Company inspecting machine parts. He

was laid off apparently due to a reduction in force as a result of lack of work. Edwards was unemployed from November 7, 1985 until September 25, 1986 when he got a job through a temporary service. He worked for Excellon as a receiving inspector checking parts that had been shipped into the company from September 25, 1986 until November 5, 1986 when that job ended. Thus, the totality of Edwards' experience as a mechanical inspector was eleven weeks.

The central issue at trial was very precise: Did the Employer establish that jobs as a mechanical inspector were available to the Claimant?

At the hearing before the Administrative Law Judge ("ALJ"), Todd submitted two labor market surveys and testimony regarding available work for mechanical inspectors in Los Angeles and Orange Counties.

The first labor market survey procured by the Employer was conducted in March, 1985 (four months before Claimant was certified as a mechanical inspector in June, 1985).

Three of the listings required at least one year of experience which Edwards did not have. For two other listings, the required qualifications were uncertain and

for the rest there were no present openings. As to the March, 1985 survey the ALJ found that no more than two of the listings showed current openings and a willingness to accept applicants without prior experience .

In a November, 1986 survey, at least three of the ten listings required one or more years of prior experience. Edwards testified that he also did not have the experience required by a fourth employer A fifth listing did not require specific experience but had no openings. Thus, at least half of the listings on their face precluded Claimant.

Employer's Rehabilitation Specialist, Stephen Lowe, testified that claimant was personable, on-time, visited employers regularly, and was otherwise fully cooperative. Claimant looked for work in El Segundo, Carson, Inglewood, Long Beach and Orange County. He spent approximately five hours a day, four days per week following up job leads through newspapers and though employed friends.

Additionally, claimant contacted all employers listed on the labor market survey obtained by the Employer.

The Employer's witness, Stephen Lowe, agreed that Claimant attempted to

obtain employment at 39 different places without success.

Claimant, working with the Employer's rehabilitation specialist failed to locate even one job opening after contacting all the employers on the labor market survey.

Based on more than thirty pages of testimony with reference to Claimant's attempts to find work, the ALJ found that Claimant diligently attempted to find work as a mechanical inspector .

The ALJ further found that the employer did not meet its burden of

showing suitable alternative work available to the Claimant.

> In spite of the positive review of claimant's interviewing skills by the job development specialist and claimant's efforts to secure and retain a job as a mechanical inspector, he has had very little success. His first employment as a mechanical inspector ended due to insufficient available work. (TR 58) Although respondent's rehabilitation specialist testified to a foreseeable growth in the need for mechanical inspectors, this foreseeable growth appears purely speculative (TR 64). Respondents have shown some listings of job openings; but have not established that these job openings are available to claimant or are ones he could realistically compete for and have a chance of securing. Thus I find that

> respondents have not met their burden of showing suitable alternative work that is available.

Todd appealed the ALJ's decision to the Benefits Review Board which held that the one job at Nordon ipso facto demonstrated the existence of suitable alternative employment. The BRB, relying on P & M Crane Company v. Hayes, 930 F. 2d 424 (5th Cir. 1991), noted that even one suitable alternative employment position could be sufficient to satisfy the employer's burden of establishing suitable alternative employment. However, that case also held that "whether the one job identified by the Employer's expert is actually available would be a factual

determination for the particular case". Id. at 431.

The BRB took no notice of whether or not substantial evidence supported the contrary conclusion - that the two temporary jobs were no longer available to Claimant and he therefore had no realistic province of ongoing available employment. Ignoring the fact-finding province of the ALJ, the BRB simply decided the issue de novo. In so doing, the BRB also ignored Claimant's showing of diligence in attempting to secure the allegedly available work and held that such a showing played no role whatsoever in either the establishment of suitable

alternative employment or rebutting the showing thereof.

Edwards appealed to the Ninth Circuit Court of Appeals which framed the issue as: "Whether Edwards' short-lived job as a mechanical inspector satisfied Todd's burden of proving the existence of suitable alternative work." 999 F. 2d 1374, 1375 (9th Cir. 1993).

The Ninth Circuit adopted the view of the Director of the Office of Workers' Compensation Programs that an eleven week job as a mechanical inspector did not ipso facto carry Todd's burden of showing suitable alternative work. This was the case because Todd failed to establish that

employment as a mechanical inspector was "realistically and regularly available" to Edwards on the open market. Id.

The Ninth Circuit noted initially that the Longshore and Harbor Workers' Compensation Act ("the Act") requires the employer to pay permanent total disability benefits when an injured worker is no longer able to perform his usual customary job duties. The employer may escape that liability only if realistic wage earning alternatives exist for the injured worker. To permit the employer to escape financial responsibility by showing illusory or temporary jobs would defeat the very purpose of the Act by leaving an injured

worker unemployed and unemployable, without disability benefits. Consequently, to establish suitable alternative employment such that the employer is relieved of its obligation to provide permanent disability benefits, the employer must show "post-injury employment ... sufficiently regular to establish true earning capacity." Id. Such a result "fairly serves the long-term remedial purpose of the LHWCA, an Act designed to 'compensate for any injury-related reduction in wage-earning capacity through the claimant's lifetime.' Randall v. Comfort Control, Inc., 725 F. 2d 791, 799 (D.C. Cir. 1984) (emphasis added)" (Footnote deleted). Id. pp. 1375-1376.

The Ninth Circuit further found that substantial evidence in the trial record supported the ALJ's determination that Todd did not prove the availability of suitable alternative work. The proferred jobs in Todd's labor market surveys were generally not available because Edwards lacked the requisite experience or he was unable to get the listed jobs for other reasons despite a diligent and exhaustive search. Id. p. 1376.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH SETTLED LAW AND THE REMEDIAL PURPOSES OF THE LHWCA.

To make its case, Todd grossly exaggerates the Ninth Circuit's holdings. Nothing in the opinion requires an Employer to act as an employment agency for a claimant's lifetime. Edwards is consistent with prior decisions which require an employer to show real, available, sustainable employment to avoid their obligation to pay permanent and total disability benefits. Bumble Bee Seafood v. Director, OWCP, 629 F. 1329

(9th Cir. 1980); Hairston v. Todd Shipyards Corporation, 849 F. 2d 1194 (9th Cir. 1988). Not only must the Employer be able to point to specific jobs which claimant could be expected to fill given all his limitations and abilities, these jobs must actually be available in the community where claimant resides. New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1042-1043 (5th Cir. 1981). American Stevedores, Inc. v. Salzano, 538 F. 2d 933, 935-936 (2d Cir. 1976).

Nothing in the Ninth Circuit's opinion in Edwards requires the Employer to act as a lifetime employment agency. See

Todd's brief at p. 17. To the contrary, the only requirement of Todd was to show prior to trial the existence of jobs which Claimant could likely secure and hold if reasonably diligent. The ALJ determined that Todd failed to do so.

The legal principle is settled. The Employer must show available, suitable, sustainable alternative employment. As a factual matter, the ALJ is in the best position to determine whether a specific showing meets the legal standard.

Todd argues that a showing of any job for any duration, presumably even for only a day, would satisfy the employer's

burden of demonstrating suitable alternative employment and sever Todd's responsibility to provide lifetime disability benefits. This is absurd. No reasonable person could justify terminating permanent and total disability benefits because the employer showed a one-day temporary job which claimant obtained. But at what level is a showing sufficient? The ALJ, as the sole factfinder in the process, is in the best position to evaluate the alternative jobs proferred by the employer, the suitability of those jobs to claimant, the claimant's diligence in seeking the jobs and any circumstances which may render the employer's showing illusory.

Contrary to Todd's brief, Edwards does not "require an employer to meet its Bumble Bee standard not just once but repeatedly over Claimant's lifetime." Todd brief pp. 17-18. The employer need make the showing only once but the showing must be sufficient in scope that the claimant could realistically expect to obtain regular and continuous employment.

Todd further exaggerates Edwards as standing for the proposition that "not withstanding (sic) the identification of specific jobs, failure to obtain or hold a job, for whatever reason, will impose upon the employer a permanent and total

award. (Footnote deleted)." Todd brief p. 18.

Edwards says no such thing. Edwards merely stands for the proposition that an Employer must establish, based on substantial evidence, that a claimant could likely secure suitable alternative employment if reasonably diligent. Nothing in Edwards precludes a finding of suitable alternative employment in those situations where the claimant fails to show up for employment, falsifies records or otherwise loses employment due to his own actions. What happened to Edwards was totally different. Edwards lost employment

through no fault of his own and was left unemployed and unemployable because no suitable work existed for him.

II

THE ISSUE IS NOT YET READY FOR SUPREME COURT RESOLUTION

What constitutes a showing of suitable alternative employment remains an issue in flux at the Court of Appeals level. Although no Circuit requires an employer to act as a guarantor of employment during a claimant's lifetime, various courts have expressed the necessary showing in different ways. In the Ninth Circuit, the employer must show specific jobs which the claimant could

likely secure and hold if reasonably diligent. The Second Circuit in Palombo v. Director, OWCP, 937 F. 2d 70 (2nd Cir. 1991) established a three-step process. If claimant is first able to demonstrate his inability to return to his prior occupation, he is entitled to permanent and total disability benefits. The burden then shifts to the employer to prove the existence of suitable alternative employment in the claimant's community. If the employer carries its burden, the claimant may rebut the employer's showing by demonstrating that he diligently but unsuccessfully attempted to secure such employment. This process has been endorsed by the

Fourth Circuit in Newport News Shipbuilding and Dry Dock Company v. Tann, 841 F. 2d 540, 542 (4th Cir. 1988) and the Fifth Circuit in Rogers Terminals v. Director, OWCP, 784 F. 2d 687, 691 (5th Cir. 1986).

However, the Fifth Circuit disagrees with the basic premise of Bumble Bee that specific jobs must be shown. New Orleans(Gulfwide) Stevedores v. Turner, 661 F. 2d 1031 (5th Cir. 1981); Avondale Shipyards v. Guidry and Director, OWCP, 967 2d 1039 (5th Cir. 1992).

Another recent disharmonious case is Brooks v. Director, OWCP, 2 F. 3rd 64

(1993). In Brooks the claimant lost his employment due to his own misconduct. In Edwards, the job was lost because it was no longer available. The Brooks court framed the issue generally, saying that where employment is lost for reasons unassociated with claimant's disability he is not entitled to permanent and total disability benefits. The Court did not distinguish between those situations where a claimant loses ongoing employment because of misconduct and the situation in Edwards where a claimant loses employment because the employment no longer exists.

Because Circuit Courts of Appeal are continuing to define circumstances which

make or defeat a showing of suitable alternative employment, the issue is not yet ready for Supreme Court review. Clearly Edwards is fully consistent with long-standing Ninth Circuit precedent and the precedent in most other Circuits. Conflict with the Fifth Circuit in particular may be resolved as further litigation clarifies the appropriate standard.

CONCLUSION

The Ninth Circuit's decision in Edwards is fully consistent with the remedial purposes of the LHWCA, prior precedent within the Ninth Circuit and the majority of other Circuit opinions on the

issue. To the extent the legal and factual definitions are still evolving, as evidenced by recent decisions in the Second and Fourth Circuits, the issues addressed in Edwards should remain at the Court of Appeals level for further clarification and possible harmony.

For all these reasons, Todd's Petition For Writ of Certiorari should be denied.

Respectfully submitted,
LAW OFFICES OF DIANE L. MIDDLETON

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Diane L. Middleton
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Respondent

Supreme Court, U.S.
FILED
MAR 25 1994
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No. 93-1224

In the Supreme Court of the United States

OCTOBER TERM, 1993

TODD PACIFIC SHIPYARDS CORP., ET AL. PETITIONERS

v.

RICHARD L. EDWARDS AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly reversed the determination by the Benefits Review Board that suitable alternative employment was available to a disabled claimant under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, who had found a job that lasted only eleven weeks, but who otherwise had been unable to secure permanent employment.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1224

TODD PACIFIC SHIPYARDS CORP., ET AL. PETITIONERS

v.

RICHARD L. EDWARDS AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 999 F.2d 1374. The decision of the Benefits Review Board (Pet. App. A12-A27) is reported at 25 Ben. Rev. Bd. Serv. (MB) 49. The decision of the administrative law judge (Pet. App. A28-A57) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 14, 1993. The petition for rehearing was denied on September 10, 1993. The petition for a writ of certiorari was filed on December 8, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Todd Pacific Shipyards Corporation employed respondent Richard Edwards as a welder-burner. Pet. App. A5. Petitioner Aetna Casualty and Surety Company is an insurance carrier that provides coverage to Todd Pacific Shipyards for its liability on claims under the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.* Pet. 6 n.2.

In May 1981, Edwards suffered a work-related lower back injury that ultimately left him unable to perform his usual welder-burner duties. Pet. App. A5, A30. Petitioners provided him with training as a mechanical inspector, and he obtained a mechanical inspector job in August 1985 with a manufacturing company. *Id.* at A5, A14-A15, A30. After only 11 weeks, Edwards was discharged due to a workforce reduction. *Id.* at A5. Edwards was unable to find other employment, except for a six-week temporary position as a receiving inspector starting in September 1986. *Id.* at A15, A35.

2. Edwards filed a claim for total disability benefits under the Longshore Act. After a hearing in December 1986, an administrative law judge (ALJ) awarded Edwards permanent total disability benefits.[1] Pet. App. A5, A29. The ALJ reasoned that because it was undisputed that Edwards was unable to perform his usual employment, petitioners had the burden of demonstrating that suitable alternative employment was available to him. *Id.* at A36. The ALJ found that although petitioners submitted two market surveys listing employers of

[1] It was undisputed that Edwards was entitled to only partial disability payments during his brief periods of employment as an inspector, measured by the difference between his pre-injury average weekly wages and his weekly wages as an inspector. Pet. App. A33-A34.

mechanical inspectors, the listed employers did not have current openings or the openings had experience requirements that Edwards could not meet. *Id.* at A39-A40, A42. The ALJ therefore concluded that petitioners did not satisfy their burden of establishing the availability of suitable alternative work for Edwards. *Id.* at A42.

The ALJ also concluded that Edwards' brief periods of post-injury employment did not in themselves demonstrate that there was suitable alternative employment available to him. The ALJ rejected petitioners' argument that it was determinative that Edwards' post-injury employment ended for reasons unrelated to his disability. Pet. App. A42-A45. The ALJ distinguished a series of Benefits Review Board decisions upon which petitioners relied, noting that in those cases there had been a showing of alternative employment and that the claimant's loss of employment was due to his own conduct. *Id.* at A43-A45. Finally, the ALJ held that even if petitioners had made an initial showing that jobs were reasonably available, Edwards had rebutted that showing. The ALJ found that Edwards had diligently, but unsuccessfully, sought permanent employment as an inspector, as demonstrated by his efforts to contact the employers listed in petitioners' market surveys and by the reports of the job development specialist assigned to his case. *Id.* at A41, A45-A46.

3. On petitioners' appeal, the Benefits Review Board reversed. Pet. App. A12-A27. The Board held that petitioners are required to identify "specific suitable alternat[ive] employment that [Edwards] is capable of performing in his community considering his age, education, vocational history, and physical limitations," and that petitioners had satisfied that burden by showing that Edwards was employed after his injury. *Id.* at A20-A21. The Board declined to require an employer to iden-

tify "new" suitable alternative employment where, as here, the claimant was laid off due to economic factors, not due to his disability. *Id.* at A22-A23. Imposing such a requirement, in the Board's view, would be tantamount to making an employer a "long-term guarantor of a claimant's employment." *Id.* at A22. The Board therefore reversed the ALJ's award of permanent total disability benefits and held that Edwards was entitled only to permanent partial disability benefits.[2]

4. The court of appeals reversed, Pet. App. A1-A11, concluding that the Board erred in holding that Edwards' 11-week employment carried petitioners' burden of establishing the availability of suitable alternative work. *Id.* at A8-A10. Deferring to the view of the Director of the Office of Workers' Compensation Programs, the court held that petitioners were required to show that suitable alternative work was "realistically and regularly available." That interpretation, the court concluded, is consistent with the Act's use of wage-earning capacity as the touchstone of the extent of disability, because "earnings in post-injury employment must be sufficiently regular to establish true earning capacity." *Id.* at A8-A9. The court further reasoned that the Director's interpretation serves "the long-term remedial purpose of the LHWCA" to compensate for losses in wage-earning capacity through the employee's lifetime. *Id.* at A9.

Having ruled that the Board had erred as a matter of law, the court then held that substantial evidence

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[2] The Board stated that because it found that Edwards' 1985 mechanical inspector job conclusively resolved the issue of suitable alternative employment, it did not need to address Edwards' temporary employment in 1986 or his showing of due diligence in attempting to find employment. Pet. App. A23.

supported the ALJ's determination that petitioners had failed to show the availability of suitable alternative employment. The court noted that almost half of the openings for mechanical inspectors listed in petitioners' market surveys required experience Edwards did not have, that Edwards had contacted without success the other employers in the listing, and that Edwards had searched diligently, yet unsuccessfully, for jobs at firms not listed in the survey. Pet. App. A10-A11.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with that of any other court of appeals. Further review is therefore unwarranted.

1. The issue raised by the petition is whether, as a matter of law, post-injury short-term employment precludes a finding of permanent total disability under the Longshore Act, even where a claimant diligently, but without success, seeks regular employment. Petitioners' contention is that once a claimant secures a job, however temporary, that job conclusively establishes the regular availability of such work (unless the physical impairment caused the claimant's loss of that employment) and, therefore, that the employee is not totally disabled within the meaning of the Act. The court of appeals correctly rejected that rigid rule. It properly held that substantial evidence supported the ALJ's finding that suitable alternative employment was not available to the claimant in this case, even though he had obtained some short-term employment.

Under well-established burdens of proof applicable to Longshore Act disability claims, once an employee establishes the inability to perform his or her pre-injury job duties because of an employment-related injury, the employee is presumed to be totally disabled unless the em-

ployer demonstrates the availability of suitable alternative employment. *Director, OWCP* v. *Berkstresser*, 921 F.2d 306, 311-312 (D.C. Cir. 1990). To discharge that burden, the employer must show that the employee is medically capable and otherwise qualified to perform jobs reasonably available to him or her. See, *e.g.*, *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d 1031, 1042 (5th Cir. 1981); *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 935-936 (2d Cir. 1976). Likewise, the employer must show that in fact there are such reasonably available jobs. *Turner*, 661 F.2d at 1042. If the employer satisfies those burdens, the employee may rebut the employer's evidence by showing that a diligent job search was unsuccessful. Pet. App. A11 & n.2 (citing cases).

This paradigm comports with the basic principle under the Longshore Act that disability is an economic as well as a medical concept, 33 U.S.C. 902(10), with the consequence that an employee's compensation for disability is ordinarily measured by the injury's impact on the employee's wage-earning capacity. See 33 U.S.C. 908(a), 908(c)(21); compare 33 U.S.C. 908(c)(1)-(20) (scheduled injuries), 908(c)(23) (retirees disabled by occupational disease). The degree of an employee's disability "is determined not only on the basis of physical condition but also on factors such as age, education, employment history, rehabilitative potential, and the *availability of work* that the claimant can do." *Turner*, 661 F.2d at 1038 (emphasis added). Thus, an employee who is physically capable of performing alternative work is nonetheless totally disabled if unable to secure such work and earn wages. *Ibid.*; see also *Palombo* v. *Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991); *Stevens* v. *Director, OWCP*, 909 F.2d 1256, 1257 (9th Cir. 1990) ("[u]ntil there is a job that

the injured worker can perform, his injury is totally disabling"), cert. denied, 498 U.S. 1073 (1991).

A major purpose of the Longshore Act is to compensate employees for reductions in their wage-earning capacity resulting from work-related injuries. *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984). That purpose is served by assessing, as realistically as possible, the effects of the disabling job injury on wage-earning capacity; it would be frustrated by petitioners' approach to determining job availability—that a claimant's ability to obtain a short-term job forecloses a finding of total disability, even if there are no other suitable alternative jobs available once the short-term job ends.

A single job of temporary duration may not accurately reflect the general availability of jobs in the marketplace and, therefore, the employee's capacity to earn wages on a regular basis. See 1C Arthur Larson, *Law of Workmen's Compensation* § 57.35, at 10-247 (1993) ("earnings in post-injury employment [must be] sufficiently regular and continuous to establish [a] true earning capacity"). That is precisely the case here. At the time of the ALJ hearing, there was substantial evidence to support the ALJ's conclusion that jobs were not realistically available to Edwards on a continuous basis, even though he had briefly obtained some work. See Pet. App. A42. Rather, as the ALJ found, petitioners' market surveys identified only mechanical inspector jobs that were not reasonably available to the claimant, who had made diligent, but unsuccessful, efforts to obtain permanent employment as a mechanical inspector. *Ibid.* Thus, a rule that a single job of temporary duration automatically establishes suitable alternative employment would, in this case, subvert the Longshore Act's goal of com-

pensating an employee for an actual loss of wage-earning capacity. See Pet. App. A9.

2. Petitioners assert (Pet. 24) that the decision below "discards actual employment as a measure of earning capacity." The court of appeals, however, held that Edwards' short-term employment, while relevant, was not an absolute measure of his employability. Instead, Edwards' long periods of unemployment, coupled with his unsuccessful efforts to obtain employment, supported the ALJ's conclusion that he had no realistic ability to obtain regular employment on the open market, and thus retained no significant wage-earning capacity.[3]

Petitioners also assert (Pet. 25) that the decision below imposes upon the employer a "continuing duty" to establish the existence of suitable alternative jobs for a claimant over his lifetime. Petitioners are incorrect. The decision simply sustains the ALJ's ruling that, at the time of the hearing on the total disability claim, Edwards' wage-earning capacity as a mechanical inspector was non-existent because no employment of that nature was realistically available to him.[4] If circumstances

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[3] In a related context, the Longshore Act avoids a mechanistic approach to assessing an employee's wage-earning capacity. See 33 U.S.C. 908(h) (if actual earnings of a permanently partially disabled claimant do not "fairly and reasonably represent" his wage earning capacity, the factfinder should look at other factors affecting the claimant's capacity to earn wages, including "the effect of disability as it may naturally extend into the future").

[4] Although the Benefits Review Board held that the employer had established the availability of alternative employment for Edwards, the Board is an appellate review body that does not make policy determinations or factual findings and engages only in substantial evidence review of findings by the ALJ. 33 U.S.C. 921(b)(3); *Stevens*, 909 F.2d at 1257. The Board's decision was premised on its view that Edwards' 1985 job conclusively established that he was only partially disabled, a ruling that went be-

change and the claimant secures employment in the future, or a showing of its availability to him becomes possible, the employer will have the right under the Longshore Act to seek modification of the compensation awarded to reflect the "change in conditions." 33 U.S.C. 922.

3. Petitioners point (Pet. 18-22) to a difference among the courts of appeals regarding the burden imposed on the employer to establish suitable alternative employment. The Ninth Circuit appears to require an employer to provide evidence of specific openings that are available to the claimant, whereas the Fifth Circuit accepts a more general showing of available work. Compare, *e.g.*, *Bumble Bee Seafoods*, 629 F.2d at 1330, with *Avondale Shipyards, Inc.* v. *Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992) (employer need not show specific openings and "simply may demonstrate the availability of *general job openings* in certain fields in the surrounding community") (quoting *P & M Crane Co.* v. *Hayes*, 930 F.2d 424, 431 (5th Cir. 1991)). To the extent that difference has practical significance, it does not bear directly on the distinct question that this case presents.[5] Petitioners do

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yond substantial evidence review of factual issues. Moreover, as a non-policymaking adjudicatory body, the Board's interpretations of the Longshore Act are not entitled to deference. *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). Rather, as the court of appeals recognized, it is the Director's interpretation (here, with respect to the employer's burden to show that alternative employment is realistically and regularly available) that is entitled to deference. Pet. App. A7-A8; see also *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Zapata Haynie Corp.* v. *Barnard*, 933 F.2d 256, 259-260 (4th Cir. 1991).

[5] Petitioners also assert (Pet. 18-19) a conflict between the decision below and the First Circuit's decision in *Air America, Inc.* v.

not argue here that the court of appeals improperly rejected general evidence of job availability by imposing a requirement that petitioners establish actual job openings; rather, their petition focuses on whether Edwards' actual, albeit temporary, employment conclusively established the existence of suitable alternative employment. See Pet. 17 (arguing that petitioners complied with the Ninth Circuit's *Bumble Bee* standard, but that the Ninth Circuit required an even more onerous showing). The Fifth Circuit decisions cited by petitioners (Pet. 20) do not address the question of temporary post-injury employment.[6]

Director, OWCP, 597 F.2d 773, 779-780 (1979) (burden to establish suitable alternative employment did not shift to employer where former pilot, who was college trained and had a broad range of administrative and supervisory skills, no longer had the requisite degree of coordination to be a pilot, but the deficiency did not "indicate an inability to perform other work"). In *Air America*, the court specifically reserved the question of whether "in many, perhaps most, cases," the burden of demonstrating suitable alternative employment should be placed on the employer. 597 F.2d at 781. Because *Air America* reserved that question, and *a fortiori* did not discuss the nature of the burden in cases where it is properly placed on the employer, there is no conflict with *Air America*.

[6] Nor does the decision below conflict with that of the Fourth Circuit in *Brooks* v. *Director, OWCP*, 2 F.3d 64 (1993) (per curiam), as petitioners contend (Pet. 21-23). *Brooks* held that the claimant's post-injury employment showed that there was suitable alternative employment for the claimant in that case, even though the claimant had been discharged from that employment because he had falsified information pertaining to a previous injury on his employment application. *Brooks* is distinguishable because the claimant's loss of post-injury employment was due to personal misfeasance, rather than the unavailability of work; unlike here, the job continued to exist and could have been filled by the claimant if he had not falsified the injury information in violation of company rules. See Pet. App. A43-A45 (distinguishing cases like *Brooks*).

Moreover, the precise nature of an *employer*'s burden is of little importance at this stage of this case. Cf. *U.S. Postal Service* v. *Aikens*, 460 U.S. 711 (1983). Every court of appeals to address the question has recognized that even if the employer meets its burden of introducing evidence of the availability of suitable alternative employment to the claimant, the claimant may nonetheless establish total disability by demonstrating that he or she diligently tried, but was unable, to secure such employment. See, *e.g.*, *Avondale Shipyards, Inc.*, 967 F.2d at 1043; *Palombo*, 937 F.2d at 73. The ALJ specifically found that Edwards diligently sought work as a mechanical inspector but was unable to find a permanent job, a finding that the court of appeals upheld. Pet. App. A11 & n.2.

In stating that the burden of showing suitable alternative employment can be met "by showing a suitable job that the claimant actually performed after his injury," 2 F.3d at 65, the court of appeals in *Brooks* did not suggest that such a showing is sufficient in all cases, including where, as here, the claimant's actual employment was cut short by a reduction in force and there was other evidence that suitable alternative employment was not realistically available to him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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